CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States,

October Term, 1936.

No. 207

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

TEX-PENN OIL COMPANY.

No. 208

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

M. L. BENEDUM.

No. 209

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

F. B. PARRIOTT.

SUPPLEMENTAL MEMORANDUM.

RECORD REFERENCES AND QUOTATIONS FROM COMMISSIONER'S BRIEFS AS GIVEN IN ORAL ARGUMENT.

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On Behalf of Respondent Benedum.

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SUPPLEMENTAL MEMORANDUM.

RECORD REFERENCES AND QUOTATIONS FROM COMMISSIONER'S BRIEFS AS GIVEN IN ORAL ARGUMENT.

Responsive to the request of the Court there are noted below references to the record touching on the Board's findings as to the amount of cash received by M. L. Benedum

and F. B. Parriott upon the sale of their part of the five-eighths interest in the Duke-Knoles leases.

I.

The Board held certain documents conclusive in fixing the consideration received by Tex-Penn. In particular in its opinion (at R. 122, l. 30) it accepted the Benedum-Parriott-Holliday agreement of July 24, 1919 (F. 40, R. 79) as controlling. That document in paragraph 2 denominated the $350,000 as part of the consideration for Tex-Penn assets, and by paragraph 1 also declared that Benedum and Parriott were to transfer their interest in the leases "for and in consideration of" $3,400,000 cash.

In the Board's final order of redetermination it found that Benedum and Parriott received for their lease interest—*not $3,400,000, the consideration recited in the document, but* —$3,553,125, as follows:

BENEDUM (R. 2122, ll. 15 to 18, Vol. IV)*	
"Received: Cash	$1,368,750.00"
PARRIOTT (R. 2269, ll. 8 and 9, Vol. V)*	
"Received: Cash	2,184,375.00"
Total.....	$3,553,125.00

This total of $3,553,125.00 is the exact amount of the $3,750,000 due to Benedum and Parriott (Benedum $1,500,000, Parriott $2,250,000) out of the $9,000,000 payable to the five individual lessees (R. 71, Findings 23, 24) less their proportionate contribution to the $350,000 fund, or $196,875 (Benedum $131,250, Parriott $65,625; R. 92 Finding 56).

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* The findings so quoted, appear in "Respondent's (Commissioner's) Proposed Computation of Deficiency" submitted by him under Rule 50; record citations as above. The Board's final orders ran "Upon consideration and *in accordance with the proposal of the respondent* (Commissioner), it is **Ordered and Decided** that there is a deficiency in income tax for the year 1919 in the amount of * * *" (Italics supplied). Benedum R. 2139, Vol. IV; Parriott R. 2283, Vol. V.

The respective sums of $1,368,750 and $2,184,375 the Board found were received by Benedum and Parriott for the sale of their lease interests, for, in computing the limited surtax upon the income from the sale of oil properties, the Board adopted these figures as the income from the sale of "discovery oil property." (See R. 2125, ll. 1-3, Vol. IV; R. 2270, ll. 33-35, Vol. V; also, our brief in this Court, p. 63.)

II.

Responsive to the request of the Court there are supplied below certain quotations read in course of oral argument from the briefs and memoranda filed by counsel for Commissioner in the proceedings below, viz.:

a. Re validity of Article 1567 of Regulations 45.

Prior to the final argument and decision in the Board of Tax Appeals, at the request of the Board, the Commissioner filed a memorandum setting forth his position as to the validity of Article 1567 of Regulations 45. Counsel for the taxpayers quoted from this memorandum in the oral argument in this Court, as follows:

> "Memorandum in Regard to Section 202(b) of the Revenue Act of 1918 and the Pertinent Articles of Regulations 45 Submitted in Accordance with the Request of the Presiding Member of the Board of Tax Appeals.
>
> Article 1567 of Regulations 45 is the construction put upon section 202(b) of the Revenue Act of 1918 by the Commissioner of Internal Revenue, approved by the Secretary of the Treasury. That article stands unrevoked. Such being the case the Commissioner of Internal Revenue stands upon that article as his position before the Board in these cases.
>
> It should perhaps be explained that at the time these cases were being prepared for trial, the matter of the validity of article 1567, Regulations 45, was given special consideration by the office of the General Counsel and by the Treasury Department. It was the general view that while there might be some question as to the

legal soundness of the regulation, in view of the fact that it had been in effect for a long period during which numerous cases had been adjusted under it, the Commissioner should not take a position in these cases contrary to this regulation."

A full copy of the memorandum from which this quotation was read has been left with the Clerk of this Court.

The Commissioner's brief in the Circuit Court of Appeals reaffirmed this position. For convenience we reprint below the quotation from page 46 of the Commissioner's brief in the Circuit Court which appears in the footnote on page 50 of our brief in this Court:

> "This part of Article 1567, fairly interpreting the statute, should not be disturbed. It has been applied for many years, and Benedum and Parriott have received benefit therefrom in fixing their bases in the disposition of their Transcontinental stock in future years. *It seems unlikely that the regulation could have existed so long without attack if there had been a reasonable doubt as to its correctness.*" (Italics supplied.)

b. Re Tex-Penn stockholders non-liability for Tex-Penn debts.

Counsel for the taxpayers quoted from page 17 of the Commissioner's brief in the Board of Tax Appeals as follows:

> "The conditions of fact and those imposed by the reorganization plan were as follows:
>
> 1. The assets of the Tex-Penn Oil Company were to pass clear of encumbrance.
>
> 2. The 1,007,834 shares of the Transcontinental stock were to go direct to Benedum and Parriott so that they could keep their agreement with the bankers and have possession and control over it from the instant of its issue.
>
> 3. The stockholders as such were not liable for the Tex-Penn Oil Company's debts.

4. The owners of the overriding royalty *were not liable* to the creditors for the Tex-Penn Oil Company's debts.

5. The agreement among the stockholders of the Tex-Penn Oil Company (either as stockholders or as overriding royalty owners) to pay that company's debts *would not give a right of action to the creditors against those stockholders* (or royalty owners), nor would that agreement release the creditors' lien on the assets." (Italics supplied.)

A full copy of the brief from which this quotation is taken has been left with the Clerk of this Court.

The Agreement of October 31, 1918, under which the leases were conveyed to Tex-Penn subject to the reserved 5/8 interest, was asserted by Counsel for the Commissioner in oral argument in this Court to create a trust affecting the proceeds of the sale of the 5/8 interest. This document is set out in full at R. pp. 1799-1803, Vol. III of the record and we quote below the pertinent provisions, beginning at line 20, p. 1800:

* * * but it is provided always, nevertheless, in this behalf that there shall be paid unto the said F. B. Parriott, who is one of the said parties to these presents, five-sixteenths of the *proceeds derived from the sale of oil, natural gas and gasoline* under these presents, who shall apply the same to the payment of the indebtedness of the said party of the second part in the way and manner following, that is to say: That, commencing on the first day of July, 1919, settlements shall be made by and between the said party of the second part and the said F. B. Parriott, semi-annually, that is to say; on the first day of July and the first day of January in each and every year during the terms of these presents, at which said settlement there shall be ascertained the total amount of money that may meanwhile have been received by the said party of the second part, as well as its expenditures made and indebtedness and obligations incurred during the same time, and should the money that may have been received by the said party of the second part be less than the sum of its expenditures,

indebtedness and obligations aforesaid, there shall be applied by the said F. B. Parriott whatsoever sum or amount may be required to pay off or satisfy the said indebtedness and obligations, retaining for himself and the other parties of the first part to these presents, whatsoever sum or balance may remain in his hands. And it is further provided always with reference to the said five-eighths part, portion, share and interest of, in and to the said oil, natural gas and gasoline by these presents kept, saved, excepted and reserved unto the said parties of the first part, their heirs, executors, administrators and assigns, as aforesaid, that in every instance when it may become impossible for the said party of the second part to make delivery in kind that a proportionate part of the gross income in money may and shall be substituted." (Italics supplied.)

Respectfully submitted,

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